

# EXHIBIT 1

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-1789-smb

4 - - - - - x

5 In the Matter of:

6 SECURITIES INVESTOR

7 PROTECTION CORPORATION,

8 Debtor.

9 - - - - - x

10 Adv. Case No. 12-01576-smb

11 PICARD

12 v.

13 BNP PARIBAS S.A. et al.

14 - - - - - x

15 United States Bankruptcy Court

16 One Bowling Green

17 New York, New York

18 March 9, 2018

19 10:02 a.m.

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22 B E F O R E:

23 HON. STUART M. BERNSTEIN

24 U.S. BANKRUPTCY JUDGE

25 ECRO: TL

1 HEARING RE BNP Paribas S.A.'s Motion to Dismiss (ECF 106)

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25 Transcribed by: Theresa Pullan

1 A P P E A R A N C E S :

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1 P R O C E E D I N G S

2 THE CLERK: Please be seated.

3 THE COURT: Picard v. BNP.

4 MR. PEACE: Good morning, Your Honor, Breon Peace and  
5 Ari MacKinnon for the BNP defendants.

6 MR. MACKINNON: Good morning, Your Honor.

7 MS. WASICK: Good morning, Your Honor, Joanna Wasick  
8 of Baker & Hostettler for the Trustee with my colleague, Marco  
9 Molina.

10 THE COURT: Thank you. Go ahead.

11 MR. PEACE: Thanks, Your Honor. So as you know we're  
12 here on the defendant's dismissal motion. We have put in  
13 briefing and argue that all of the claims asserted by the  
14 Trustee should be dismissed.

15 There are several grounds for dismissal which I'll  
16 take in turn and tell you sort of the road map that we sort of  
17 plan to go through the various issues, Your Honor.

18 So first, Your Honor, as we raise, the amended  
19 complaint was improperly filed. The Trustee had not gotten --

20 THE COURT: I can treat this as a motion --

21 MR. PEACE: For leave to amend.

22 THE COURT: Futility argument.

23 MR. PEACE: Exactly, Your Honor. And the argument  
24 that we have is that that will be futile so you should not  
25 grant leave. And it's futile for several reasons.

1           One is the transfers that the Trustee seeks to  
2       recover outside of the two year look back period are barred  
3       under 546(e) safe harbor.

4           THE COURT: I don't understand that argument.

5           MR. PEACE: Your Honor, should I lay it out? Shall I  
6       lay these issues --

7           THE COURT: I read it and I think I know what you're  
8       citing but I don't understand or maybe I should say I don't  
9       agree with it.

10          MR. PEACE: Okay.

11          THE COURT: The subsequent transferees, the 546(e)  
12       defense is a defense that an initial transferee can assert.

13          MR. PEACE: Correct.

14          THE COURT: The debtor doesn't have to separately  
15       establish its right to sue under, I'm sorry, the Trustee,  
16       doesn't have to separately establish the right to sue under  
17       546(e) to recover from the subsequent transfers. It's not even  
18       mentioned in -- 550 isn't even mentioned in 546(e).

19          MR. PEACE: Your Honor, to address that point, Judge  
20       Rakoff from the District Court dealt with this issue and  
21       specifically said in the Comad (phonetic) decision that  
22       subsequent transferees can raise the 546(e) defense in the  
23       context of a case where the Trustee has settled with the  
24       initial transferees.

25          THE COURT: You can argue that the initial transfer

1 is --

2 MR. PEACE: Correct.

3 THE COURT: But that's a different argument. And the  
4 Trustee has incorporated by reference the complaints in Ascot  
5 and --

6 MR. PEACE: Well, it's really the Tremont fund, Your  
7 Honor.

8 THE COURT: And the Tremont funds. And you haven't  
9 explained to me in your motion why those complaints are legally  
10 insufficient.

11 MR. PEACE: Right. So, Your Honor, on that point  
12 they did incorporate by reference the allegations of the  
13 Tremont complaint. If Your Honor looks at that complaint, Your  
14 Honor will conclude that the allegations in that complaint do  
15 not make out actual knowledge which is the standard that they  
16 have to meet to overcome the 546(e) safe harbor.

17 THE COURT: But you didn't really explain to me why  
18 in your motion and I'm not going to go through those pleadings  
19 and try and guess at trial if we get there. You can certainly  
20 show that the Trustee cannot avoid the initial transfer for  
21 whatever reason, but you haven't really articulated it in your  
22 motion and I'm just not going to consider it.

23 MR. PEACE: Your Honor, on the face of the complaint,  
24 which as Your Honor will analyze as part of the total --

25 THE COURT: I'm not going to analyze the Ascot or the

1 Tremont complaint.

2 MR. PEACE: The Tremont complaint is sort of the run  
3 of the mill red flag theory complaint which does not at all  
4 assert that the Tremont defendants possess actual knowledge of  
5 the fraud.

6 THE COURT: Would you tell me in your motion or show  
7 me in your motion where you analyzed the Tremont complaint or  
8 the Ascot complaint and explain why the claims barred by 546(e)  
9 were, certainly that wouldn't apply to the intentional  
10 fraudulent transfer claim, but why the Tremont complaint or the  
11 Ascot complaint are otherwise legally insufficient?

12 MR. PEACE: Your Honor, we say in our reply brief on  
13 page 9 that the Trustee had incorporated by reference in the  
14 amended complaint the allegations against the Tremont funds as  
15 initial transferee. And we say that they plain fall short of  
16 alleging the actual knowledge necessary for the safe harbor to  
17 apply.

18 THE COURT: You know, if you made a motion to -- if  
19 you represented an initial transferee and you made a motion to  
20 dismiss the complaint simply arguing that the complaint clearly  
21 falls short without explaining to me why it clearly falls  
22 short, we wouldn't be spending any time having a conversation.  
23 So why don't we move off of that because first of all, you  
24 raised it in your reply brief so that's grounds alone to not  
25 consider it. But I'm just not going to go through the Tremont



1 complaint without you telling me why it's insufficient.

2 MR. PEACE: Your Honor, there's nothing in the  
3 Tremont complaint that alleges actual knowledge. That was,  
4 frankly, we thought pretty plain by the allegations. And the  
5 only thing that the Trustee includes, the Trustee doesn't say  
6 they allege actual knowledge with respect to Tremont. The only  
7 thing the Trustee includes is a statement in the amended  
8 complaint that says the Tremont funds knew of the fraud.

9 THE COURT: Why don't we move on to the next point?

10 MR. PEACE: Okay. Your Honor, the second point that  
11 we want to raise that demonstrates that the complaint, the  
12 amended complaint, will be futile is that the Trustee hasn't  
13 adequately pled that any of the BNP defendants were willfully  
14 blind to the Madoff fraud. So that's point two that we'll  
15 cover.

16 The third and fourth points, Your Honor, are one,  
17 they haven't established personal jurisdiction over the BNP  
18 defendants and certain of the claims that the assets in this  
19 purported amended complaint are time barred.

20 THE COURT: Can I ask you a question? I don't know  
21 the answer to this one.

22 You've asserted that there's lack of jurisdiction and  
23 you've also asserted that the complaint fails to state a claim  
24 basically, which to me is a merit based determination. If I  
25 agree with you, can I grant the motion to dismiss without

1 deciding whether or not I have personal jurisdiction over the  
2 defendants?

3 MR. PEACE: I think you would decide personal  
4 jurisdiction, Your Honor.

5 THE COURT: I have to decide.

6 MR. PEACE: I think you would decide personal  
7 jurisdiction first and then --

8 THE COURT: Unless I suppose I deny the motion for  
9 leave to amend on the grounds that it's futile, in which case I  
10 don't have to get into personal jurisdiction. All right. I'll  
11 hear from the Trustee on that one.

12 MR. PEACE: So, Your Honor, just in terms of a  
13 roadmap, I was going to cover [indiscernible] which we already  
14 did. And I would cover the willful blindness.

15 THE COURT: They ultimately turn out to be a good  
16 defense, although it's not a defense to the intentional  
17 [indiscernible] anyway so, it doesn't matter.

18 MR. PEACE: I will cover the willful blindness  
19 issues.

20 THE COURT: Okay.

21 MR. PEACE: And then my colleague, Mr. MacKinnon,  
22 will cover the personal jurisdiction and the time bar issue.

23 Your Honor, with respect to the willful blindness  
24 issue, the Trustee does not allege sufficient facts with  
25 particularity to make out willful blindness with respect to

1 each and every BNPP defendant.

2 THE COURT: That I understand, but let's go to Mr. --

3 MR. PEACE: Yes.

4 THE COURT: If that's the correct --

5 MR. PEACE: Yes.

6 THE COURT: And after he raises what the Trustee  
7 would call red flags, BNP or one of the -- BNP terminates the  
8 Oreades fund. And the Trustee argues that at least for the  
9 purposes of a motion to dismiss that supports an inference that  
10 BNP knew that there was, and I'll say something wrong for the  
11 time being, with Madoff and BLMIS.

12 MR. PEACE: So, Your Honor, first I'll step back and  
13 say the Trevane [phonetic] correspondence when it's read in  
14 full demonstrates that Trevane did not question whether or not  
15 Madoff was actually trading securities which is the standard  
16 that Your Honor has articulated in many opinions about willful  
17 blindness. They have to show subjective belief that there's a  
18 high probability Madoff was not actually trading securities.

19 If you look at the correspondence -- and it's  
20 interesting because the Trustee laid out this correspondence in  
21 a prior complaint, the Oreades complaint and then this  
22 purported amended complaint, removes we think a relative  
23 sentence that will reflect what Mr. Trevane's subjective  
24 beliefs were at the time.

25 So the excerpt I'm thinking of, Your Honor, and if

1 you need a copy of the Oreades complaint, I can --

2 THE COURT: I looked at it but I don't have it. But  
3 I'm familiar, and I know he seemed to be from the regulatory  
4 issues --

5 MR. PEACE: Right.

6 THE COURT: -- BLMIS and also that it didn't seem  
7 that they were concerned about where the U.S. Treasury bills  
8 were and they were also concerned that the sales were not being  
9 attributed to the proper customers.

10 MR. PEACE: Correct, Your Honor. So you identified.  
11 The concerns he relayed were related to, okay, they're  
12 securities. How do I make sure they are where they say they  
13 are, where are they being held, and the like? It's not a  
14 question of is Madoff not actually trading securities, is  
15 Madoff a fraud. Well, actually read the excerpt, Your Honor,  
16 because I think it's instructive. It says, and this is from  
17 paragraph 56 of the Oreades complaint. The excerpt is, and  
18 this is Trevane "it will be appropriate to put this type of  
19 order transmission in place between us and B. Madoff because in  
20 current practice we have no opportunity to consider the true  
21 validity of the orders."

22 So he's saying they're getting the orders, you know,  
23 seven days late or so, they need a better process in order to  
24 verify what's in the respective accounts. This is the sentence  
25 that the Trustee left out of the amended complaint. I don't

1 know why. It was in the Oreades complaint, but he left it out.  
2 And I think it's important. "As broker/dealer, B. Madoff was  
3 audited and it seems that everything is correctly posted. But  
4 since there is no B. Madoff management company, it is surely  
5 very difficult for the auditors to verify that all the deals  
6 carried out on behalf of the clients of B. Madoff are correctly  
7 indexed to the same clients."

8 So, Your Honor, he is not raising concerns. This  
9 doesn't reflect a subjective belief of high probability that  
10 Madoff is not trading. He assumes and credits that Madoff is  
11 trading, and then is trying to figure out a way to verify that.

12 And it goes on, Your Honor, which is interesting  
13 because whatever inquiries he did have, he followed up and this  
14 also shows up in the Oreades complaint. He seeks from BLMIS  
15 verification "independent verification" as to Oreades's assets  
16 and it's two underlying BLMIS accounts. That was then provided  
17 to BMP Paribas Securities Service by DiPascali, BLMIS and  
18 separately the auditor, Friehling and Horowitz.

19 THE COURT: Is this in the Oreades complaint?

20 MR. PEACE: It is in the Oreades's complaint Your  
21 Honor, and I can patch you --

22 THE COURT: I recall. I know you cited to both the  
23 Proffer and the Oreades complaint.

24 MR. PEACE: Yes, this is paragraphs 57 through 59 of  
25 the Oreades complaint, Your Honor. Then he received

1 confirmation that he asked for, verification that these  
2 securities are in the BNP Paribas Securities Services Accounts.  
3 So the issue for Trevane was not at all whether or not there  
4 was actual securities trading going on, the issue was one of  
5 allocation of verification that they are where they say they  
6 are. That in and of itself does not make out willful blindness  
7 in this circumstance.

8 Now, Your Honor did talk about and it's true that  
9 they went on to shut down the Oreades accounts and liquidate.  
10 But you identified other reasons, other factors that were  
11 clearly being considered as to whether the Oreades fund was  
12 being operating in compliance with Luxembourg law, not that  
13 Madoff was a fraud and so we had to liquidate this investment.  
14 And I think that's the critical piece, Your Honor. Because  
15 that, the Trevane emails is really the lynchpin of their  
16 complaint. Because they are the most specific allegations of  
17 any individual BNP Paribas Securities Services employee. And  
18 that does not meet the standard.

19 Your Honor, and interestingly and I think the Trustee  
20 has sort of dismissed this out of hand, but we thought it was  
21 interesting that and I think it's a tacit concession that there  
22 was the Oreades complaint, they sued BNP Paribas Securities  
23 Services relating to this transaction, then they decided to  
24 dismiss the BNP Paribas Securities Services from that action  
25 and all other BNP defendants.

1 Now they obviously have the option to do that. The  
2 Trustee has sued hundreds of parties and I think, we think that  
3 that sort of indicates how they view this correspondence with  
4 Trevane that it doesn't meet the willful blindness test, and we  
5 think that was significant, Your Honor. And I think it's  
6 distinguishable from emails and correspondence that Your Honor  
7 has assessed in connection with the Legacy case, for example,  
8 where you know the individuals are talking about real concerns  
9 they have about whether or not Madoff is actually doing the  
10 trading that he said he was doing. That is not at all what we  
11 have with respect to Trevane.

12 So if you take Trevane out of this, Your Honor, which  
13 I think we should, the rest of the complaint is really at  
14 bottom a red flag inquiry notice compliant. I think the  
15 Trustee was trying to artfully draft the complaint that does a  
16 few things. One, relies heavily on group pleading, conflating  
17 BNPP defendants as if they're one when there are four  
18 defendants and they have to establish willful blindness as to  
19 each of the defendants which they don't do.

20 There are no allegations, specific particularized  
21 allegations, with respect to BNPP bank and BNPP Cayman, there  
22 are no specific allegations regarding BNPP Paribas Arbitrage.  
23 The only specific allegations they have regarding BNP Paribas  
24 Securities Services are the ones we just discussed.

25 And then with respect to BNP Paribas S.A., that's

1 sort of where they just use that name more broadly and  
2 attribute anything that any third party or nonparty thought  
3 about Madoff, they try to attribute that to BNP Paribas S.A.

4 THE COURT: I thought the amended complaint alleged  
5 that there were these various committees and representatives  
6 from each of these entities that participated in one or more of  
7 these committees.

8 MR. PEACE: They do allege that there were committees  
9 that evaluated the Madoff transactions. I don't think they  
10 alleged that the were representatives from each attendants on  
11 the committees. They say senior executives, Your Honor. But  
12 this is from BNP Paribas S.A.

13 THE COURT: Okay.

14 MR. PEACE: And just to go through, I just want to  
15 spend a little time, Your Honor, on the allegations that remain  
16 which again I think we would argue make out [indiscernible]  
17 barely and not willful blindness or subjective beliefs that BNP  
18 Paribas defendants believe there's a high probability that no  
19 securities were being traded, that it was a Madoff fraud.

20 What they do is really focus on a couple of buckets  
21 of people. You talk about third parties, not in privity with  
22 BNP Paribas.

23 THE COURT: But I think in Société Générale they say  
24 that they told somebody at BNP --

25 MR. PEACE: They said they told -- a game of



1 telephone, Your Honor. They told someone at ZCM who told some  
2 unknown people at BNP Paribas that SocGen had concerns about  
3 Madoff. They don't identify what the concerns are, they don't  
4 identify who was told, what was said to them, when it happened.  
5 Your Honor, that's not particularized enough to make out high  
6 probability that they believe there was a fraud, right, that  
7 there was no securities being traded. It makes out that they  
8 didn't want to invest with Madoff and they decided not to. But  
9 their judgment shouldn't be held against BNP Paribas. Clearly  
10 as the Trustee alleges, the BNPP did diligence on the ZCM  
11 transaction and decided to go forward with its investments.

12 They mention another third party, Dresner (phonetic)  
13 which decided not to invest with Madoff and had possession of I  
14 guess the Renaissance report, nowhere do they allege that any  
15 BNP Paribas defendant possess the Renaissance report.

16 THE COURT: Or they said they didn't.

17 MR. PEACE: Exactly, Your Honor. And so the fact  
18 that Dresner decided not to invest with Madoff is wholly  
19 irrelevant to what the BNP Paribas defendants did.

20 And then they talk about a couple of other  
21 individuals that are somehow linked to BNPP. They talk about  
22 an employee in BNP Paribas private wealth unit who said that  
23 he, I think it was, he hated Madoff and always had a problem  
24 with him and so he didn't invest with Madoff.

25 A couple of things about that. I'm not sure what

1 hated Madoff means and whether it doesn't reflect that he's  
2 saying Madoff is not trading securities and he's engaged in  
3 fraud. They also don't allege that this gentleman's views were  
4 conveyed to anyone else within the BNP Paribas defendants. So  
5 that's a big sort of nothing burger, Your Honor, with respect  
6 to Gianferrara.

7 The last is indication about someone named Mr.  
8 Fauchier who is a representative of Fauchier Partners. They do  
9 claim upon information and belief, now they claim that Fauchier  
10 Partners was in a joint venture with BNP Paribas entity. They  
11 claim that in June 2008, and that date is important, Your  
12 Honor, that he said that he didn't think Madoff was legitimate.  
13 And then they say that he relayed upon information and belief  
14 he shared his knowledge that Madoff was illegitimate with other  
15 senior officials at BNP Paribas. First of all thinking they  
16 don't say what he shared, they don't say when he shared it.

17 THE COURT: But I mean if they alleged that in the  
18 first instance that he didn't believe that Madoff would  
19 actually trade in securities or he was a fraud --

20 MR. PEACE: That's not what they -- that's not the  
21 allegation.

22 THE COURT: Whatever it is they say. And then they  
23 say, and he shared his concerns with somebody at BNP. Isn't it  
24 reasonable to infer that those were the concerns that he shared  
25 without spelling it out again in the amended complaint?

1 MR. PEACE: Your Honor, I think this is an example  
2 again of not a particularized allegation here. It's not clear  
3 what he shared; it's not clear to whom he shared it with and  
4 when he shared it. And the reason I focused on June 2008 is  
5 because it's unclear he shared this after the Ponzi scheme was  
6 revealed in December of 2008. It's very unclear from this  
7 record what these allegations --

8 THE COURT: What part of the complaint, amended  
9 complaint?

10 MR. PEACE: This is 136, Your Honor. I think it's  
11 133 and 136.

12 The other point to raise on this, Your Honor, they  
13 claim as you see that Fauchier told these concerns to Access  
14 which is a non-BNPP entity, that he never invested in a fraud,  
15 that his diligence team required a fund to be legitimate and  
16 that he rejected Madoff. But it's unclear from these  
17 allegations what was, if anything, was relayed to BNP Paribas.  
18 There's not specificity to these allegations, Your Honor. And  
19 interestingly with respect to this joint venture he was  
20 supposedly in with BNPP, it's not alleged that that has any  
21 relation to the Madoff investments. So whatever knowledge or  
22 beliefs he had, there's no basis to refute that to BNP Paribas.  
23 There's nothing that says this is all in the context of working  
24 with BNP Paribas on Madoff investments. So that's the other  
25 thing on Mr. Fauchier.

1           The last point, Your Honor, on this, just to make --  
2     the rest are the red flags Your Honor is well familiar with.  
3     And I think the critical point here is that again they make  
4     conclusory allegations that the BNPP defendants knew all these  
5     parade of horrors, what in effect is Your Honor is equally  
6     notice pleading. All they say is the BNPP defendants got  
7     account statements. Right. And from that they knew all these  
8     things and which we know is not enough to plead with  
9     particularity that they had subjective belief that Madoff was  
10    not trading securities. Your Honor has ruled on that numerous  
11    times. They've gone no further in this case with respect to  
12    those red flag allegations.

13           And the last thing I'll say on this particular point,  
14    Your Honor, and we talk about this in our papers. And I know,  
15    Your Honor, when you analyze these complaints, you not only  
16    should look at the allegations but as you've said in many of  
17    your opinions, you consider plausibility, you take into account  
18    using your experience and common sense as to whether the  
19    overall allegations are plausible. And here, Your Honor, we  
20    posit that they're not with respect to the economics.

21           So the Trustee wants Your Honor to believe that BNP  
22    Paribas defendants had suspicions that Madoff was engaged in a  
23    fraud and so they shut down Oreades. And they want you to  
24    believe that the same year they decided to expand their  
25    investments in Madoff and ultimately enter into transactions

1 totaling billions of dollars by providing clients credit or  
2 leverage.

3 The interesting thing about that, it's not, Your  
4 Honor, we're not making the broad argument that a party will  
5 never do something that's not necessarily in their interest.  
6 But here, it's economically irrational. Here's why. If they  
7 suspect that Madoff, it's a high probability he's a fraud, he's  
8 not trading securities, what they do then from a business  
9 perspective is enter into transactions in which they're  
10 expending capital, they're giving other parties money basically  
11 so they can invest in Madoff. Right. So their outlaid capital  
12 --

13 THE COURT: Was BNP making loans to the feeder funds?

14 MR. PEACE: BNP was making loans to its clients that  
15 wanted to have exposure to the feeder funds and to Madoff.

16 THE COURT: So who's being -- maybe I should ask the  
17 Trustee this because I didn't quite get it when it says, you  
18 know, they're extending leverage. To me it means they're doing  
19 business. I don't know what that means.

20 MR. PEACE: Well, I'll explain that, Your Honor.  
21 Because it's interesting because --

22 THE COURT: I'm interested in who the obligors are in  
23 these transactions and whether the Trustee is alleging that BNP  
24 is incurring obligations from entities whose sole business is  
25 to invest in BLMIS.

1 MR. PEACE: I think the Trustee can --

2 THE COURT: I'll ask the Trustee.

3 MR. PEACE: But what I want to say on this, Your  
4 Honor, which I think is very important is the structure of the  
5 business. So they're arguing that BNPP is basically giving  
6 client money to invest in Madoff with suspicions that there's a  
7 high probability that he's engaged in fraud. And in exchange  
8 they get fees or interest on the loan. All right. So big cash  
9 outlay, small return in terms of money.

10 The other thing, Your Honor, that's really  
11 significant here is what's BNPP's protection on this business?  
12 Collateral. What does the collateral consist of? Feeder fund  
13 shares, Madoff related assets.

14 THE COURT: You know, that's why I asked about the  
15 obligor. The obligor can be JPMorgan and they don't care about  
16 the collateral.

17 MR. PEACE: No, these are as they plead, these are  
18 transactions in which the collateral is based on Madoff. It's  
19 feeder Fauchier, its investment in Madoff. So if this Ponzi  
20 scheme, Your Honor, is revealed, they lose everything which is  
21 in an article that was cited by the Trustee and incorporated by  
22 reference. It mentions the losses that BNPP suffered as a  
23 result of this because the business was structured in such a  
24 way where they had no upside, a lot of downside risk. It's  
25 just irrational if you believe that BNPP believed there's a

1 high probability of fraud so we engage in this type of business  
2 with respect to Madoff as opposed to other parties that  
3 invested in Madoff that were getting the 18, 19 percent upside  
4 on their investments. Totally different business, Your Honor,  
5 and I think that undermines the narrative that the Trustee has  
6 set forth. So I wanted to mention that, Your Honor.

7 If you want, I could cover due diligence. I think  
8 our argument is largely that they don't establish that there  
9 were suspicions of high probability that they weren't trading  
10 securities. They don't get there. So they can't show that we  
11 turned a blind eye to a fraud.

12 But, just a minute on due diligence. What's  
13 interesting about this is while they say we didn't conduct due  
14 diligence, and they say we deviated --

15 THE COURT: Yeah, I think they said deviated from  
16 your normal standards.

17 MR. PEACE: We deviated. And it's interesting, Your  
18 Honor, because if you read the complaint and you read the  
19 Oreades complaint and extraterritorial proffer that they put in  
20 regarding activity, you will see a laundry list of diligence  
21 activities that BNP Paribas engaged in vis-à-vis Madoff. So  
22 this is not turning a blind eye to fraud. This is BNPP doing  
23 business, I think the most plausible inference, doing business,  
24 no suspicions of fraud, did some routine customary due  
25 diligence periodically, did not identify red flags, and this

1 Ponzi scheme revealed others including BNP Paribas are hurt.

2 And the last point, Your Honor, and I'll sit down, is  
3 just on the value argument briefly. We believe that the  
4 complaint sets out enough to find value here. Under 505(b) for  
5 subsequent transferees as Your Honor laid out in Legacy, the  
6 only value required is mere consideration. It's not the  
7 reasonably equivalent value that's required for an initial  
8 transferee. In this case, clear, they redeemed shares, and in  
9 exchange got the transfers.

10 THE COURT: How did they get the shares?

11 MR. PEACE: These were collateral. Sometimes they  
12 invested directly as a result of a hedge on the derivative  
13 transaction. Other times it was, they got the shares as  
14 collateral. So the shares, the payments would come to BNP  
15 Paribas by entities that pay down the loans.

16 And, Your Honor, that should cover the entire  
17 transfers.

18 THE COURT: Thank you.

19 MR. MACKINNON: Good morning, Your Honor. My name is  
20 Ari MacKinnon and I'm going to talk about as Breon mentioned,  
21 the issues of jurisdiction and statute of limitations.

22 So just briefly on personal jurisdiction. As you  
23 know, there are two types of jurisdictions -- general and  
24 specific. I'm not going to spend much time on general personal  
25 jurisdiction here, just start by saying none of the BNPP



1 defendants is incorporated or has its principle place of  
2 business here. So Daimler should control.

3 I think the party's principle dispute relates to the  
4 question of specific personal jurisdiction. Our view is that  
5 the cases in To, the recent decisions in To, Hill and  
6 [indiscernible] should provide guidance on how to do the  
7 personal jurisdiction analysis here for the BNPP defendants,  
8 all of whom are incorporated abroad and have their principle  
9 places of business abroad.

10 In To and Hill, and [indiscernible] you had  
11 allegations that the defendants had entered into custodian and  
12 administrative agreements here in New York with Blumis  
13 (phonetic), transferred funds here to Blumis in New York.

14 THE COURT: Can I stop you? What was the recent  
15 Second Circuit case? There's a recent Second Circuit case and  
16 it talks about a sliding scale. And BNP Paribas has been here  
17 since the 1800s, has thousands of U.S. employees, has an office  
18 in New York, maybe it has an office elsewhere, I don't  
19 remember. How much more would they have to show with respect  
20 to just BNP Paribas, a parent I guess, to show special  
21 jurisdiction?

22 MR. MACKINNON: I think to have specific jurisdiction  
23 here they would have to really focus on the conduct that's at  
24 issue and show that that conduct happened here in New York as  
25 opposed to abroad. Focus on -- and that's one of the reasons

1 this case is very different from BLI. Where if you look at the  
2 Judge's opinion, Judge Lifland's opinion in BLI, there is  
3 tracking and tracing of each and every transfer from a New York  
4 located bank account belonging to Fairfield to a New York  
5 located bank account belonging to BLI. There are also  
6 allegations about Fairfield's choice of law provisions, choice  
7 of forum provisions here in New York which do not, we don't  
8 have here for Tremont. That sort of tracking and tracing would  
9 get them closer, but that's just BNP Paribas.

10 When you've got Cayman, for whom there are basically  
11 no New York nexus alleged, security services falls in the same  
12 boat as Cayman. They've got -- although there's an allegation  
13 they have an office here, they've got no personnel here under  
14 the complaint, no allegation they have a New York bank account,  
15 no allegation they received the transfers at issue in any such  
16 New York account.

17 Arbitrage is similar. Arbitrage is alleged to have an  
18 office here and supposedly contributed some employees to the  
19 fund derivatives group, but there's no allegation that those  
20 employees were here in New York and therefore no reason to  
21 conclude that Arbitrage even had any employees here.

22 And I think another thing that's coloring our view on  
23 the BLI decision. which really features understandably  
24 prominently in the Trustee's opposition, the law in personal  
25 jurisdiction has changed significantly since BLI came down.

1 We've got Daimler which came down, but more importantly Walden  
2 vs. Fiore which makes clear that we really have to be focusing  
3 on the defendant's contacts with the forum, and we can't use a  
4 stream of commerce type theory to evaluate personal  
5 jurisdiction. It's not enough under Walden vs. Fiore that the  
6 BNP defendants knew or even intended for their money to wind up  
7 here. You have to focus on their actual context with the  
8 forum.

9 So our view is post-2014, it's really the To, Hill,  
10 and [indiscernible] line of cases that should guide the  
11 personal jurisdiction analysis and they just haven't done  
12 enough tracking or tracing here to show that their specific  
13 conduct arises out of New York or U.S. based context.

14 I can turn briefly to the SOL argument. The  
15 complaint, the amended complaint includes new transfers from a  
16 fund called Insurance Portfolio which the fund does not appear  
17 in the original complaint. There's about \$40 million worth of  
18 transfers that are alleged as to that fund. And then there are  
19 some new transfers as to another Tremont fund portfolio limited  
20 that did appear in the original complaint, but all the  
21 transfers in the original complaint were well within the two  
22 year lookback period. And now we've got transfers, new  
23 transfers, most of which are from outside that two year  
24 lookback period, 2004, '05, and '06.

25 The Trustee concedes that these claims are time

1 barred unless of course they relate back. Basic relation back  
2 argument the Trustee has put forward is that all the claims  
3 relate to the Madoff fraud [indiscernible] operative fact, and  
4 that that should be enough. But we think that proves too much  
5 in a case such as this where you've got a far reaching fraud  
6 such as the Madoff fraud, and more importantly where you really  
7 look at the original complaint and compare it to this one, the  
8 original complaint has totally different factual narrative.  
9 And the relation back case law really focuses on were the  
10 defendants put on notice by that original complaint of the new  
11 claims.

12 THE COURT: Well, why weren't you put on notice that  
13 they were going to come after you for any transfers that Madoff  
14 made to any of these feeder firms that you subsequently  
15 received transfers from?

16 MR. MACKINNON: Well, as to insurance portfolio, the  
17 feeder fund never appeared in the original complaint. So no  
18 notice as to insurance portfolio.

19 The other, I think, factor that should color our view  
20 of this is the original complaint in this matter is about four  
21 years after the Madoff fraud came to light. I think it was  
22 fair for the BNPP defendants to assume that after four years  
23 had passed, the Trustee would have at least identified the  
24 feeder funds that are at issue that transferred monies to the  
25 BNPP defendants. That should get rid of insurance portfolio

1 because it didn't appear at all in the original complaint.

2 I think also reading the original complaint and  
3 focusing on portfolio limited, we were talking about two year  
4 transfers, which makes sense and made sense at the time perhaps  
5 because we didn't have in the original complaint any far  
6 reaching theory along the lines of what Breon talked about,  
7 BNPP defendants supposedly being aware of or almost being  
8 active participants in the fraud. That's their new theory in  
9 the original complaint.

10 So the original complaint maybe put us on notice of  
11 the two year transfers. But to go back beyond the six year  
12 transfers that are alleged in the new complaint, they don't, we  
13 weren't put on notice that those might subsequently be at  
14 issue. And I think the case in Metzeler is helpful for us in  
15 that respect because it talks about how your expectations can  
16 be sort of limited by a timeframe.

17 That's kind of our core arguments on personal  
18 jurisdiction and statute of limitations. So unless you have  
19 any questions.

20 THE COURT: Thank you.

21 MR. MACKINNON: Thanks.

22 MS. WASICK: Good morning, Your Honor, Joanna Wasick  
23 of Baker & Hostettler for the Trustee.

24 THE COURT: Good morning.

25 MS. WASICK: Your Honor, I'd like to first address

1 what constitutes a good faith defense under section 550.  
2 Because what we just heard the defendants argue is that if I  
3 take money out of BLMIS thinking it might be a Ponzi scheme  
4 then I lack good faith and those funds are recoverable for  
5 distribution to customers. But if I take money out of BLMIS  
6 even though I know that there all these signs of fraud and I  
7 believe that there's a high probability that Madoff is  
8 conducting a fraud, if I don't know the specific details of  
9 what kind of fraud that is when I'm taking the funds, then I'm  
10 acting with good faith.

11 THE COURT: But to satisfy the requirement that, and  
12 nobody seems to have mentioned this separate requirement that  
13 you have to not know about the avoidability of the initial  
14 transfer. Don't you have to suspect that he is not, he's  
15 engaged in a Ponzi scheme basically?

16 MS. WASICK: Your Honor, the emphasis on a Ponzi  
17 scheme, that came in during the 546(e) analysis, and I'll  
18 discuss it more if we need to later. But I bring it up briefly  
19 here just as a point of reference because section 546(e) was  
20 designed to safeguard the securities industries specifically.  
21 And so it offers a safe harbor defense to certain participants  
22 in that industry. So the District Court found that when he was  
23 determining whether initial transfers were avoided, whether  
24 546(e) applied, something that's there to protect the  
25 securities industry shouldn't also protect the transferee who

1 knows very well that the securities being traded don't exist.

2 So there --

3 THE COURT: I don't think 546(e) is necessarily  
4 relevant in determining the liability of the defense of a  
5 subsequent transfer. But you seem to be arguing that there's  
6 some lower threshold for the good faith analysis under 550(b),  
7 it doesn't have to be knowledge of a Ponzi scheme it just has  
8 to be knowledge that there's something wrong. And I don't know  
9 how you apply that.

10 MS. WASICK: Yes, Your Honor, and we agree that  
11 546(e) does not apply to subsequent transfers. I'm using it as  
12 a point of contrast because their actual knowledge of a Ponzi  
13 scheme specifically is important because 546(e) is focused on  
14 securities.

15 THE COURT: So what do you think good faith means  
16 under 550(b)?

17 MS. WASICK: Sure. Under 550, it's a general  
18 provision so there are basic bankruptcy concepts such as  
19 fraudulent transfers and insolvency which becomes an issue  
20 whenever the transferor is or could be committing a fraud. So  
21 it doesn't make any practical or meaningful difference whether  
22 I think the funds are coming as a transferee from a Ponzi  
23 scheme or --

24 THE COURT: Good faith generally means under the UCC  
25 honesty and fact, so what does the complaint allege that BNP

1 did that was dishonest?

2 MS. WASICK: There are numerous things, Your Honor,  
3 that BNP -- I'm sorry, BLMIS you're asking or BNP?

4 THE COURT: Well, it's BNP's good faith as the  
5 subsequent transferee that's at issue under 550(b). Does the  
6 complaint allege they did anything dishonest?

7 MS. WASICK: What they did they turned away from red  
8 flags that suggested a high probability of fraud which is  
9 exactly what the Court held, the first time the District Court  
10 ever assessed whether, what constitutes a lack of good faith  
11 and recovery proceeding that was addressed directly by the  
12 Court, District Court for the first time in 2011 in the Caps  
13 (phonetic) decision. And there the Court held that the lack of  
14 good faith requires assuring that the defendant "chooses to  
15 blind himself to the red flags that suggest a high probability  
16 of fraud."

17 THE COURT: And you think that's an inquiry notice or  
18 they have to have actual notice?

19 MS. WASICK: Absolutely not. And again, this is an  
20 actual knowledge.

21 THE COURT: Okay. So what do you allege they had  
22 actual knowledge of that triggered this bad faith?

23 MS. WASICK: Sure. I want to just steer away from  
24 actual knowledge which is at issue for 546(c) and willful  
25 blindness which is what we have here. But these are the



1       indicia of fraud, things that are laid out when BNP Paribas,  
2       BNP Paribas Securities Services are tipped off while they're  
3       running Oreades, while they're looking at these trade  
4       confirmations, they're looking at these account statements and  
5       they realize something is highly suspect. So they conduct a  
6       deeper dive, they conduct this inquiry that culminates in a  
7       report. And there are certain things that they knew.

8               Number one, Madoff is not making, giving trade  
9       confirmations until seven or eight days after the trades are  
10      actually occurring and the defendants try to disregard this  
11      concern but it stems from these two defendants' inability to  
12      confirm what stocks BLMIS or --

13             THE COURT: But then in one of the other complaints,  
14      and I want to ask you about that, one of the other complaints  
15      they say they got assurances from DiPascali and I think the  
16      auditor that the stocks are actually there and they were  
17      segregated for BNP Paribas Securities Services. But the  
18      defendants in their motion refer to in essence incorporated by  
19      reference into your complaint certain allegations about due  
20      diligence, etc. that are in other complaints were improper.  
21      And I didn't see a response from you saying, gee, you know, you  
22      can't do that. Are you contending that I can't, or arguing  
23      that I can't consider what you allege in Oreades or in the BNP  
24      proffer?

25             MS. WASICK: Your Honor, you can look at the Oreades

1 complaint? It's part of the same overall proceeding but there  
2 has been a considerable amount of time between the filing of  
3 that complaint and this one. And there are two separate  
4 proceedings. The complaint in one adversary proceeding, it's  
5 really a red herring. But more importantly, Your Honor --

6 THE COURT: But I disagree because you're talking  
7 about the same event.

8 MS. WASICK: Sure.

9 THE COURT: And you're pleading it one way, from  
10 their point of view, you're pleading it one way in Oreades or  
11 in the proffer, you're pleading it a different way here.

12 MS. WASICK: Your Honor, the Trustee doesn't consider  
13 anything in the Oreades complaint as conflicting with the --

14 THE COURT: Okay. So you have no problem with me  
15 reading the Oreades complaint as they asked me to read.

16 MS. WASICK: No, Your Honor.

17 THE COURT: Okay.

18 MS. WASICK: The Trustee concedes that you can read  
19 the Oreades complaint, but there's nothing inconsistent with  
20 that complaint and this complaint.

21 THE COURT: BNP proffer that you submit.

22 MS. WASICK: Exactly.

23 THE COURT: All right.

24 MS. WASICK: But just to go to that point, in both  
25 complaints, the Trustee articulates a concern by BNP Paribas

1 Securities Services about this trading. And --

2 THE COURT: Could BNP loan money to a client to  
3 invest in a business that was fraudulent?

4 MS. WASICK: Can you repeat that?

5 THE COURT: Is there any problem with BNP loaning  
6 money to somebody who wants to invest in a business if BNP  
7 knows it's fraudulent? But, you know, if they don't care,  
8 they're not investing in the business, the client will pay them  
9 back the money.

10 MS. WASICK: Your Honor, if we go back to 550 and  
11 there are transfers that ultimately BNP gets and they knew that  
12 that was a fraudulent transfer that was made to hinder --

13 THE COURT: But it's not necessarily a fraudulent  
14 transfer. That's a different requirement. They have to know  
15 that the initial transfer is avoidable. And I don't know how  
16 they know that unless they know that the initial transfer was  
17 part of a Ponzi scheme.

18 MS. WASICK: Probably, Your Honor. But that's not  
19 even, doesn't even have to be decided under these cases because  
20 here we are dealing with fraudulent transfers. We're dealing  
21 with transfers that were made to hinder, delay or defraud. And  
22 the complaint goes through and shows how BNP Paribas and the  
23 other three defendants, each of them knew these indicia of  
24 fraud and deliberately turned away from confirming their  
25 nature.

1 THE COURT: I have a question for you. Paragraph 4  
2 of your amended complaint you say in substance that the  
3 defendants provided billions of dollars in leverage to BLMIS  
4 feeder funds and their investors. What does that mean?

5 MS. WASICK: Your Honor, what we know is that the BNP  
6 defendants received over a billion dollars, some of which are  
7 no longer even at issue.

8 THE COURT: Does this mean they were lending money to  
9 the feeder funds?

10 MS. WASICK: Each deal had different mechanics and  
11 different details. So in pages 35 to 44, we outline different  
12 leverage deals and the part that each --

13 THE COURT: I don't know what leverage means. Either  
14 it means you're lending money to the feeder funds, whether  
15 you're lending money to third parties. I don't know what that  
16 means.

17 MS. WASICK: It can all come under the umbrella, Your  
18 Honor.

19 THE COURT: Well, what would -- and I know Mr. Peace  
20 spoke about collateral, but why would the debtor, why would BNP  
21 loan money to an entity whose sole asset, a feeder fund, its  
22 investment in BLMIS if they knew that BLMIS was not trading  
23 securities, it was a fraud?

24 MS. WASICK: Well, we've alleged that BNP Paribas  
25 suspected that BLMIS was a fraud.

1 THE COURT: But why would they -- why would they --

2 MS. WASICK: And if something is a fraud the  
3 collateral can still have value. And it had value for all  
4 those years.

5 THE COURT: But how can they have value if there's no  
6 trading in securities?

7 MS. WASICK: Your Honor, it's indicative because of  
8 what happened, they were able to keep billions of dollars that  
9 were received because of these leveraged deals. And the  
10 collateral specifically --

11 THE COURT: They got redemptions. But the plausible  
12 explanation for that is they thought that the collateral was  
13 good, and then when they had the right to it they redeemed it.

14 MS. WASICK: Well, Your Honor, it's a risk benefit  
15 reward analysis.

16 THE COURT: But what's the risk and benefit of  
17 investing in a Ponzi scheme?

18 MS. WASICK: Number one, we are not alleging that  
19 they had actual knowledge of a Ponzi scheme. And even a Ponzi  
20 scheme can be profitable given the timing.

21 THE COURT: Well, are you alleging that they had a  
22 high suspicion or they thought it was likely that Madoff was  
23 conducting a Ponzi scheme or not actually trading in  
24 securities?

25 MS. WASICK: We're alleging that the defendants

1       suspected that the trades weren't valid. And again if we go  
2       back --

3               THE COURT: I don't know what that means. You know,  
4       we've been talking for years about what's going on in these  
5       cases.

6               MS. WASICK: Well, Your Honor, that's why this  
7       decision is about willful blindness and not actual knowledge.  
8       Willful blindness is suspecting and turning away --

9               THE COURT: Willful blindness -- stop.

10              MS. WASICK: Okay.

11              THE COURT: Willful blindness of what is the  
12       question. In other words, is it willful blindness that Madoff  
13       was secretive, or is it willful blindness that he wasn't  
14       actually trading securities? That's what I'm asking.

15              MS. WASICK: It's willful blindness of fraud. So if  
16       something material is being misstated --

17              THE COURT: So what's the fraud?

18              MS. WASICK: Well the fraud ultimately was that  
19       Madoff was conducting a Ponzi scheme, and under actual --

20              THE COURT: All right. This is getting circular.

21              MS. WASICK: Sure. Well --

22              THE COURT: What did they know, what fraud were they  
23       aware of? They were aware that Madoff didn't comply with the  
24       regulatory requirements of Luxembourg law. They were aware  
25       that he was sending out delayed confirmations which itself is

1 not a fraud. What were they aware of?

2 MS. WASICK: Well, Your Honor, in terms of the trade  
3 confirmations, PNB Paribas Securities Services in real time  
4 noted that this is a concern because, but we have no  
5 opportunity to consider the true validity of the order. So  
6 defendant can try to disregard this but --

7 THE COURT: Okay. So let's say that's the problem.

8 MS. WASICK: So they don't know what's being sold or  
9 if it's being sold at all.

10 THE COURT: So they do a little due diligence and  
11 they get assurances from DiPascali and from the accountant that  
12 the securities are actually being held and segregated. So what  
13 --

14 MS. WASICK: Yes. And as we see, they wanted their  
15 own direct confirmation real time that the trade confirmations  
16 were happening. That did not happen. If you go back to the  
17 Oreades --

18 THE COURT: But that's not fraud. It's not fraud not  
19 to send instantaneous confirmations. And it sounds like what  
20 you're really arguing is they thought well gee, he doesn't do  
21 business the way we'd like him to do business, but that's not  
22 fraud.

23 MS. WASICK: Your Honor, this is not cosmetic  
24 bookkeeping. And what's important to you is after all these  
25 concerns were raised, PNB Paribas and PNB Paribas Securities

1 Services closed Oreades, they closed a successful feeder fund.  
2 You don't do that because you have concerns that, oh gee, the  
3 bookkeeping isn't being adequately done.

4 THE COURT: Why isn't it plausible to infer that they  
5 closed Oreades because they couldn't use Madoff who is not  
6 licensed in Luxembourg, wasn't even investment advisors in the  
7 United States to do what they were doing?

8 MS. WASICK: Your Honor, that was the case throughout  
9 the entire operation of Oreades. So if that was the reason why  
10 they would have shut down Oreades, they would have done it  
11 years prior.

12 THE COURT: But your pleading sort of conflates, what  
13 his name --

14 MS. WASICK: Trevane.

15 THE COURT: Trevane's warnings with shutting it down.  
16 So that must be it.

17 MS. WASICK: Well, Your Honor, that's a misstatement  
18 because these are not the warnings of Trevane. What happened  
19 was that these two defendants conducted an inquiry which  
20 culminated in a report that was discussed and circulated  
21 between two defendants. And that the Trevane email is a  
22 reaction to the report of those two defendants. So these are  
23 not the musings of some low level employee, this is a senior  
24 official of one of the defendants talking about a report that  
25 was made on behalf of both and shared with both.



1 THE COURT: I'm not suggesting it was, and BNP to  
2 argue that Trevane was some guy in the mailroom who nobody  
3 really cared what he said. But you know they've expanded on  
4 the emails which you truncated in this pleading which indicate  
5 that he had certain concerns which we've talked about and they  
6 were eventually alleviated and by closing down Oreades, they  
7 solved the regulatory problem.

8 MS. WASICK: Your Honor, we cannot concede in any way  
9 that his concerns were alleviated. To the contrary.

10 THE COURT: I understand.

11 MS. WASICK: He wants confirmation that these  
12 millions of dollars of assets exist and all he gets according  
13 to the Oreades complaint and we've since had additional  
14 discovery, third party interviews, etc. that contains those.  
15 But even taking those allegations --

16 THE COURT: Well, this complaint was filed on August  
17 30th.

18 MS. WASICK: Right.

19 THE COURT: So pretty up to date.

20 MS. WASICK: But the BLMIS "confirmation" and the one  
21 from their three person auditor is a letter that says, don't  
22 worry, the asset that you're asking about we're going to  
23 confirm to you that they're really where they're supposed to  
24 be, without any independent verification is what they asked for  
25 and without any real substance --

1 THE COURT: Well, an auditor is an independent  
2 verification. I know as it turns out, this particular auditor  
3 may not have been, but --

4 MS. WASICK: Your Honor, but in this pleading that's  
5 not what we found that they were asking. They were also asking  
6 for real time confirmation, ability to make these confirmations  
7 themselves. And they're also asking for Madoff to disclose who  
8 he was to investors and regulators. And when Madoff declined,  
9 it closed this profitable fund. And again a fund is not closed  
10 because you're concerned that the bookkeeping isn't sufficient.  
11 So --

12 THE COURT: Where do you allege about the profit of  
13 the fund?

14 MS. WASICK: The profit of the fund? Your Honor, we  
15 have numerous charts showing --

16 THE COURT: In the amended complaint.

17 MS. WASICK: In the amended complaint, later on in  
18 the complaint. But it shows that Oreades's returns go up  
19 despite the market fluctuating, Oreades continues to go up.  
20 They're making their money from Oreades, and that's reflected  
21 in the complaint. And, Your Honor, the defendants talk about  
22 this implausibility argument, why would we shut down Oreades  
23 and then switch gears to leverage business. But that's not  
24 what happened. As they're closing down Oreades, the ZCM deal  
25 opens up in which Zurich Capital Financial is selling its

1 leverage business in New York.

2 And I cannot overstate the importance of this enough,  
3 Your Honor, because one thing that PNB Paribas is lacking which  
4 keeps it from its competitors, is it doesn't have a substantial  
5 leverage business. And at this time we're going back to the  
6 early 2000s, there's this huge exploding market for leverage.  
7 So this is a big opportunity. This isn't about fees, this is  
8 about an opportunity to become a bigger and different bank  
9 through this acquisition.

10 And this is also important because this is when BNP  
11 Paribas Arbitrage comes into the fold. So Arbitrage, the  
12 managing director of Arbitrage is BNP Paribas. And all three  
13 of the defendants, Arbitrage Security Services and BNP conduct  
14 diligence on the ZCM acquisition. And they see that it  
15 includes this multi-million dollar credit facility with another  
16 Madoff feeder fund, Harley. And importantly it's this credit  
17 facility that makes other competitors decide not to go through  
18 with this acquisition. So, for example, SocGen does the same  
19 diligence on this acquisition, sees this Harley feeder fund --

20 THE COURT: Right.

21 MS. WASICK: -- looked at the trade, information from  
22 the trade confirmation, realizes that the trades are  
23 impossible, realized that the options couldn't be happening the  
24 way they reported to do. And even go back to ZCM and say,  
25 listen we'll purchase all these assets except for this one

1 credit facility. So ZCM says no, SocGen walks away. And  
2 importantly in paragraph 162 of the complaint, they allege that  
3 ZCM told BNP Paribas that this was the reason why SocGen walked  
4 away.

5 So BNP knowing full well of the fraud indicators,  
6 BLMIS knew this from Oreades, knows this from conducting its  
7 own due diligence on the deal, it decides it can't pass up on  
8 this opportunity.

9 THE COURT: With respect to 162, one of the arguments  
10 is it's not specific enough to say who told what to whom and  
11 when I guess. But presumably around that time --

12 MS. WASICK: Your Honor, this is not a baseless  
13 conclusory allegation.

14 THE COURT: But how specific, the question really is  
15 how specific you have to be in your pleading to allege what is  
16 essentially an allegation of knowledge or suspicion?

17 MS. WASICK: Your Honor, this is a subsequent  
18 transfer complaint, we're subject to rule 8, not rule 9. But  
19 regardless, this is not a conclusory allegation. It's based on  
20 a witness interview from a former CZM employee. That employee  
21 told BNP Paribas executives involved in the 2003 acquisition  
22 during negotiations that SocGen walked away from the ZCM  
23 transaction because of concerns that they had about Madoff. So  
24 there are details in that allegation that more than comply with  
25 rule 8.

1 And importantly, after they know about these concerns  
2 of fraud after they hear about SocGen, after all of this, they  
3 go forward with the ZCM acquisition and immediately their  
4 profile rises and there's buzz and there's press that BNP is  
5 now serious about being in leverage. It's a game changer. And  
6 then the defendants, all four of them, now take on more Madoff  
7 related deals that others won't take and they grow their  
8 business.

9 And out of that, not only did they get substantial  
10 fees and their employees got bonuses, they get over a billion  
11 dollars of transfer through their enterprise, and most  
12 importantly, they build their brand and they grow their profile  
13 and they're able to attract different customers that they never  
14 had access to, and then they can cross-sell their services to  
15 those customers.

16 And by now all four defendants are working on these  
17 deals and now they're getting account statements, they're  
18 getting their trade confirmations. And they're seeing the same  
19 kind of information that tipped off PNB Paribas Securities  
20 Services and Arbitrage about these fraudulent funds.

21 THE COURT: You're starting to get into a should have  
22 known argument.

23 MS. WASICK: No, not at all, Your Honor. We're  
24 saying that they knew this while they were running Oreades,  
25 they know this, they knew that these were red flags when they

1 were conducting diligence. We have emails in real time that  
2 evidence that they know that these are sign of fraud. And now  
3 they get even more information because at the end of the day,  
4 Your Honor, they're getting information from 15 different  
5 feeder funds.

6 So just as a point of contrast, SocGen when it was  
7 doing its diligence on ZCM got trade confirmation information  
8 from one feeder fund for a timeframe of two years. This is 15  
9 different funds.

10 THE COURT: Let me come back to this issue of good  
11 faith and distinction between fraud and knowing he's not  
12 trading securities. Would you agree that if BNP knew, highly  
13 suspected that Madoff was not trading securities, that its  
14 participation in these transactions wouldn't make a lot of  
15 sense?

16 MS. WASICK: Your Honor, it's subject to a risk  
17 benefit analysis. And again that pushes the risk more.

18 THE COURT: But that also explains why they might be  
19 willing to do a deal that SocGen doesn't want to do.

20 MS. WASICK: That's exactly the reason. SocGen --  
21 wasn't worth the risk to SocGen because they already had a  
22 leverage business, BNP didn't.

23 THE COURT: But the risk of what? I'm trying to  
24 figure out what you think they knew if it's not that Madoff was  
25 not trading securities --

1 MS. WASICK: Well, Your Honor --

2 THE COURT: -- that triggers this bad faith.

3 MS. WASICK: -- they didn't know anything. It's the  
4 willful blindness --

5 THE COURT: What's the bad faith?

6 MS. WASICK: The bad faith goes back to ideas of  
7 insolvency. If something happening that, and it doesn't matter  
8 I think that the funds are coming from a Ponzi scheme or  
9 another fraud, I just think that the transferor is absolutely  
10 lying about his ability to pay off these creditors. These are  
11 basic bankruptcy concepts.

12 THE COURT: I just don't understand. You seem to be  
13 saying that any time there's a chance that they won't get paid  
14 and they enter into the deal anyway that that's bad faith. But  
15 that's business; it's risk and reward. You said it yourself.

16 MS. WASICK: Well, and risk and reward is built in.  
17 And, Your Honor, I'll drop it for now and --

18 THE COURT: I'm trying to understand what it is, if  
19 it's not that they knew or suspected that Madoff wasn't engaged  
20 in a Ponzi scheme, what is it they knew, what fraud did they  
21 know that triggered bad faith?

22 MS. WASICK: Your Honor, they suspected that Madoff  
23 is lying about doing what he is supposed to be doing to a  
24 material extent that he's going to be, that BLMIS is going to  
25 be in a position where it's obviously, they're not going to at

1 some point be able to pay off all their creditors.

2 THE COURT: How do they know that? Where is that in  
3 the amended complaint?

4 MS. WASICK: Again, Your Honor, we'll go back to  
5 different allegations that start off in paragraph 114. We can  
6 start with 114.

7 THE COURT: Isn't that true of anybody you do  
8 business with? There's always a possibility that you won't get  
9 paid off. This business that I'm in is built on that.

10 MS. WASICK: Exactly.

11 THE COURT: But that doesn't mean it's all  
12 fraudulent.

13 MS. WASICK: No, but, Your Honor, going back to a  
14 Ponzi scheme, I just want to return back to your decision in  
15 the Legacy matter. Because there the Court found that the  
16 first prong of willful blindness had been adequately pleaded,  
17 notwithstanding that the Court also found that trades were,  
18 that the defendants suspected that trades were actually going  
19 on. That's evident from Your Honor's oral argument raised in  
20 the Renaissance report "the entire report is taken from the  
21 view that he's actually trading securities." And that's the  
22 transcript at 33.

23 Later in the decision, the Court notes that the  
24 defendants thought that Madoff could be front running. And  
25 that the Court says, "involved actual albeit fraudulent



1 trading." That's the decision at 31. So the Court finds the  
2 defendant suspected that securities were being traded. But  
3 regardless, the Court ends up holding that the first prong of  
4 willful blindness had been adequately pleaded. Because what  
5 matters is that the Trustee pleads that fraud was suspected.  
6 And, Your Honor, common sense gets us there too. Because the  
7 concept of willful blindness means that the defendant suspects  
8 illegal activity but turns away before confronting its nature.  
9 So requiring the defendants note specifics --

10 THE COURT: In Legacy it was illegal activity with  
11 respect to the actual trades.

12 MS. WASICK: Right.

13 THE COURT: And you're not really alleging that in  
14 the amended complaint.

15 MS. WASICK: We're alleging that they had a high  
16 suspicion that Madoff first of all was making material  
17 misstatements if you're given statements saying that the  
18 returns aren't what they are, saying that you're making option  
19 trades when there's no way that that's true.

20 THE COURT: How did they know that?

21 MS. WASICK: Well, for the trading -- well, for the  
22 focus reports, Your Honor. They knew that Madoff was saying  
23 that they had 23 accounts. Yet, at the same time, the  
24 defendants had 15 of those, and they know that they don't  
25 comprise the entirety of Madoff's business. They can see from

1 the trade confirmations and the account statements that if  
2 you're going with the SSC strategy there should be some  
3 correlation with the returns to what the market is. And these  
4 are not regular people; these are sophisticated banking --

5 THE COURT: Yeah, you know, in all of the cases that  
6 I've seen usually defined some sort of willful blindness, it's  
7 not just that the information is in there, but there are  
8 allegations that the person is actually focused on it and knew  
9 the information.

10 MS. WASICK: And in the crux of those, Your Honor,  
11 are in paragraphs --

12 THE COURT: I wouldn't infer that they knew it,  
13 simply, you know because they're getting these statements.  
14 Some of these allegations are, you looked at the statements  
15 over 16 years and 10,000 trades, you'd see 15 which were out of  
16 the daily price range, so.

17 MS. WASICK: Respectfully, I think that the facts are  
18 when you go back, they're higher than that. And again, these  
19 are 15 different funds that are being looked at. So it's not  
20 just one fund that you have to isolate different things. But  
21 facts like the option trades, BNP Paribas is the main player in  
22 option trades. It knows that there can't be these trades going  
23 on because there's just not the capacity in the market to do  
24 that. They know that this seven day timeline, defendants  
25 recognize that this is a possibility that Madoff could be

1 reporting fictitious trades based on the benefit of hindsight.  
2 So these are in the Oreades complaints. Again, they're in the  
3 ZCM arguments.

4 And again, to give more color to this, we have our  
5 allegations that for instance, Fauchier Partners who is a joint  
6 venture of BNP, he is alerted of these red flags. And  
7 importantly, Fauchier Partners is in a partnership, a joint  
8 venture relationship with BNP because of its investment  
9 expertise. And as a matter of law, the knowledge of a joint  
10 venture is imputable to --

11 THE COURT: For that joint venture, but not for  
12 anything else. Right?

13 MS. WASICK: I think the knowledge that's collected  
14 in an investment joint venture if you're there because you have  
15 this investment expertise which is what we plead in the  
16 complaint, and it is imputed to that other party and that party  
17 doesn't have to just use that imputed knowledge and not --

18 THE COURT: You think it's any knowledge a joint  
19 venture has even if it's unrelated to the joint venture?

20 MS. WASICK: No, Your Honor. But it is related here,  
21 it's about investments and assessing risk. But, Your Honor,  
22 the imputation arguments like the Gianferrara allegations as  
23 well, it just gives you color and it makes our allegations more  
24 plausible than not. And respectfully the pieces of evidence we  
25 have here show that we have a basis that we're entitled to

1 legal, we're entitled at least Your Honor to discovery so we  
2 can flesh out what's going on. Because as everyone, as counsel  
3 here knows, we haven't had meaningful discovery from these  
4 defendants. And even the basis for most of our allegations are  
5 from our own investigation.

6 THE COURT: First of all, let's -- stop.

7 MS. WASICK: Yes.

8 THE COURT: First of all, as a general principle, you  
9 don't get discovery until you plead a legally sufficient  
10 complaint.

11 MS. WASICK: Exactly, Your Honor.

12 THE COURT: And secondly, in a bankruptcy context,  
13 particularly in a case like this, you've had a lot of  
14 discovery, you have more discovery than a plaintiff normally  
15 gets.

16 MS. WASICK: Across the cases, yes, Your Honor.  
17 Although, with this particular defendant, I would not -- but  
18 that doesn't even matter. What we have here is a start and we  
19 have over 100 pages of detailed allegations as to the proximity  
20 that these defendants had to BLMIS going back to the late 80s  
21 throughout. We have visibility into 15 different funds. We  
22 have diligence teams who are looking at these trade  
23 confirmations because they want to make sure that they're  
24 continuing to make money.

25 THE COURT: So even if they did suspect and this

1 starts to get into legacy, even if they did suspect that BLMIS  
2 was engaged in some sort of fraudulent trading, but trading  
3 nonetheless, and then they do due diligence, doesn't that  
4 satisfy what they would have to show, or take them out of the  
5 willful blindness scenario?

6 MS. WASICK: I'm sorry, Your Honor, can you repeat  
7 that?

8 THE COURT: In other words, you say they suspect,  
9 they do due diligence, what more do they have to do?

10 MS. WASICK: Well, Your Honor, I'm glad you brought  
11 that up because it's not just due diligence. In fact, they're  
12 getting these red flags. And while they did do due diligence  
13 in Oreades which led them to close down the fund, while they're  
14 conducting this leverage deal, they see the same red flags.  
15 But instead of looking deeper and asking more questions like  
16 they did in Oreades, they do the exact opposite, Your Honor.  
17 And they look away and there's a bank wide directive to not  
18 follow up on any of these red flags. And that, Your Honor, is  
19 explicitly in our complaint.

20 So paragraph 167 of our complaint, "the diligence  
21 team is strict of its ability to recommend, reject or veto any  
22 BLMIS related deal." Paragraph 176 to 77. The diligence team  
23 usually vets proposed transactions, memorialize their findings.  
24 But they were told to not do that specifically with Madoff  
25 deals.

1 Paragraph 178, they break away with their policy  
2 against single manager investments. And that's a policy that  
3 existed because an increase risk of exposure to fraud. So  
4 these are substantial deliberate steps taken to avoid  
5 confirming their suspicions of fraud. This is what willful  
6 blindness looks like, Your Honor.

7 THE COURT: So why were they doing due diligence?

8 MS. WASICK: They're doing diligence to the extent  
9 that they're looking at the trade confirmations and account  
10 statements to make sure that they keep making their fees and  
11 that they keep making their money.

12 And, Your Honor, just look where we are now to see  
13 whether the risk benefit was valid. Because these defendants  
14 are now one of the biggest banking conglomerates in the world.  
15 They made their fees --

16 THE COURT: And one of the biggest losers, I guess.

17 MS. WASICK: No, Your Honor. Their standing has gone  
18 up over the years. And even if they lost some money in 2008,  
19 during all of these other years --

20 THE COURT: Some money -- \$500 million?

21 MS. WASICK: Your Honor, we do not accept this --

22 THE COURT: Pretty soon you'll be talking about real  
23 money, huh?

24 MS. WASICK: Well, that's an allegation that they  
25 culled from an article about the "BNP Group." I don't know who

1 that is.

2 THE COURT: Well, you're telling me their amongst the  
3 biggest entities now in the world, so.

4 MS. WASICK: They are, Your Honor, but --

5 THE COURT: Are you culling that from a newspaper  
6 article?

7 MS. WASICK: No, I'm culling that from their public  
8 statement.

9 But regardless, for all these other years they made  
10 their fees, their employees got their bonuses, they retained  
11 over a billion dollars of transfers that went through BLMIS and  
12 they created this leverage business that made them competitive  
13 in a way they never would have been but for these leverage  
14 deals. These are not the Madoff victims that lost their life  
15 savings and are sitting before the Court now. And the idea  
16 that they're going to be able retain these subsequent transfers  
17 that would otherwise go to victims, it runs contrary to the  
18 idea of what a court in bankruptcy and a court in equity  
19 usually does in similar circumstances.

20 So, Your Honor, unless you have more questions about  
21 --

22 THE COURT: Well, let me ask you the same question I  
23 asked them.

24 MS. WASICK: Sure.

25 THE COURT: Do I have to decide the personal

1 jurisdiction issue in order to decide the motion, these  
2 motions?

3 MS. WASICK: Given the posture, usually this is a  
4 threshold issue. And --

5 THE COURT: Personal jurisdiction or sufficiency?  
6 Legal sufficiency.

7 MS. WASICK: No. Usually jurisdiction is a threshold  
8 issue. And Your Honor did raise the exact countenance that  
9 this proceeding whether you're deciding futility, etc., it's  
10 up, it's not perfectly clear.

11 But jurisdiction. Your Honor, if you walk up Seventh  
12 Avenue and you get to about 51st Street and you turn to your  
13 right you will see this big granite skyscraper with an  
14 impressive rose stone arch over the word BNP Paribas in huge  
15 gold letters --

16 THE COURT: Do I need a time machine to go back to  
17 before 2008?

18 (Laughter)

19 MS. WASICK: No, you could do that, I think Google  
20 maps, there must be something that --

21 THE COURT: Are you suggesting I take a view?

22 MS. WASICK: I'm saying you can just take a walk when  
23 --

24 THE COURT: Okay. And if I did that --

25 MS. WASICK: Yes.



1 THE COURT: -- what would they tell me about the  
2 relationship of that sign to the transactions that are at issue  
3 in this case?

4 MS. WASICK: Your Honor, this is where three of the  
5 defendants had a permanent office, they had permanent employees  
6 who were conducting the bulk of their BLMIS related business.

7 THE COURT: But one of the arguments they're making  
8 is that under the caselaw I have to show or you have to argue  
9 or I have to find that these defendants did something here,  
10 they came here and did something in connection with the  
11 transactions that are at issue in the case.

12 MS. WASICK: They absolutely did do something here,  
13 Your Honor. They're talking to Tremont and Ascot, two domestic  
14 funds. They're routing their --

15 THE COURT: But what does that have to do with the  
16 subsequent transfers?

17 MS. WASICK: The subsequent transfers arise from  
18 those transactions. This whole entire business was about  
19 creating leverage deals and getting transfers from different  
20 funds that originated in New York and went to BNP Paribas bank  
21 accounts in New York. This is not the Hill case or the To case  
22 where there's a foreign plaintiff doing a foreign administrator  
23 of a foreign feeder fund and nobody is present in New York but  
24 somebody presses a button and a transfer goes through some BNP,  
25 some corresponding account in New York. These defendants are

1 working in New York; they're marketing their leverage from New  
2 York; they're routing money in BNP Paribas New York accounts,  
3 not correspondent accounts, actual accounts. And all our  
4 claims arise from the activity that was here, Your Honor.

5 And as for Cayman that defendants somehow separate  
6 out from the other three because the other three have these  
7 permanent employees and a permanent New York office, Cayman  
8 assigned one of their New York affiliates, New York Securities  
9 Corp. to be their agent in relation to certain of these Madoff  
10 deals. Cayman worked together with the other three defendants.  
11 They communicated with these three defendants; they facilitated  
12 transfers.

13 THE COURT: These are just kind of generalizations.  
14 Don't I have to know what they did?

15 MS. WASICK: Your Honor, yes. And so we also include  
16 -- to give more detail to the allegations in our complaint, we  
17 provided the Calvani declaration with our opposition papers.  
18 And those give even more detail about what was being done in  
19 New York. So Exhibit 3 in that declaration is the Ascot  
20 subscription agreement for BNP Paribas Cayman. And so on Bates  
21 2099 to 2102 of that document -- I'll wait if you'd like to,  
22 it's towards the end.

23 So BNP Paribas came and appoints officers of BNP  
24 Paribas Securities Corp. as agents authorized to effectuate the  
25 subscriptions and redemptions from the domestic Ascot

1 subscription fund.

2 THE COURT: Which page are you looking at?

3 MS. WASICK: It's Bates 2099.

4 THE COURT: 2099?

5 MS. WASICK: Of Exhibit 3. And as you're looking  
6 through that, Your Honor, to get to the page, I'll just remind  
7 you that the fund derivatives group and the leverage business  
8 that we're talking about ZCM, that whole assets, those were New  
9 York assets. This is the business that they inherited from ZCM  
10 that had always been in New York with New York contacts and  
11 importantly New York employees. So I'll get to this. It's the  
12 NYGASS.

13 THE COURT: I'm looking at Exhibit 3 of the  
14 declaration and it's only 38 pages. I thought you said page  
15 2099.

16 MS. WASICK: Your Honor, it says 44 of 48 on top, if  
17 that's helpful. So I'm looking for the appointment of the  
18 agent.

19 THE COURT: Would it be appointed as agent of Paribas  
20 --

21 MS. WASICK: Sorry, it's 47 of 48, Your Honor.

22 THE COURT: 47 of 48?

23 MS. WASICK: Yes. And this is the BNP Paribas  
24 Securities Corp, pursuant to the authority granted to me, an  
25 agent.

1 THE COURT: But Paribas Securities Corp isn't a  
2 defendant here, is it?

3 MS. WASICK: No, no. But if acting as an agent for  
4 one of the defendants, BNP Cayman, who is authorizing its New  
5 York affiliate to conduct some of the Madoff related business  
6 that it does in New York. So it shows, it's an example of how  
7 --

8 THE COURT: But nothing that PNB Paribas Securities  
9 did was the subject of this complaint. Right?

10 MS. WASICK: If it didn't as an agent for PNB Cayman  
11 it absolutely is, Your Honor.

12 Also, I have an easier exhibit to show you too. For  
13 Exhibit 1, for example, on page 11 of that exhibit. It's 12 of  
14 13, but it's page 11 at the bottom of Exhibit 1. And this is  
15 another subscription agreement for PNB Paribas Cayman. On the  
16 top paragraph E it talks about PNB Cayman is organized under  
17 the laws of Cayman and has its principle place of business in  
18 New York, Your Honor.

19 THE COURT: What does this relate to?

20 MS. WASICK: This is related to Fairfield Century  
21 subscription agreement for PNB Paribas Cayman. So again this  
22 is part of this New York based leverage business that's based  
23 on BLMIS and feeder funds most of which are also domestic  
24 feeder funds.

25 And if you go through this, all of the exhibits

1 you'll see more about how BNP Paribas Cayman worked with all  
2 these three defendants and used the New York offices address,  
3 used New York personnel, facilitated transfers through BNP New  
4 York bank accounts, assigned New York affiliates as agents to  
5 conduct their business, their Madoff-related business, they're  
6 exactly where these subsequent transfers claims arose from.

7 And, Your Honor, at the very least, the Trustee  
8 submits that we made a non-frivolous sufficient start towards  
9 establishing jurisdiction. So if Your Honor finds that all of  
10 these exhibits and allegations that show that the nexus between  
11 Cayman and New York, if Your Honor thinks that that doesn't  
12 establish a prima facie showing jurisdiction, discovery should  
13 be allowed while this motion is held in abeyance.

14 THE COURT: There was an issue that came up about the  
15 sufficiency of service of process. Is that resolved by the  
16 stipulation?

17 MR. PEACE: Yes.

18 THE COURT: Is there anything else? Are you done?

19 MS. WASICK: Well, Your Honor, I'd like to just touch  
20 very quickly on 546(b) and only to reference that there was a  
21 major decision last week in the Merit vs. FTI case. And if  
22 you'd like we have copies of the decision.

23 THE COURT: Well, I know the decision, but the Second  
24 Circuit has already concluded that at least the initial  
25 transfers were settlement payments on account of securities

1 contract, so it seems like 546(e) applies. That doesn't affect  
2 it. Do you agree?

3 MS. WASICK: Yes, we agree with the Supreme Court's  
4 holding. Yes.

5 THE COURT: No, I know -- whether or not you agree  
6 with the Supreme Court's holding doesn't matter. But --

7 (Laughter)

8 THE COURT: But do you agree that the holding doesn't  
9 change the result really under [indiscernible] in that the  
10 initial transfers are safe harbor because Madoff was making  
11 settlement payments on account of securities contracts.

12 MS. WASICK: For avoidance.

13 THE COURT: For the avoidance.

14 MS. WASICK: For avoidance of initial transfers, yes.  
15 We --

16 THE COURT: Yeah. No, I agree with you that you  
17 don't look to that for subsequent transfers.

18 MS. WASICK: Right. And Your Honor, I'd just like to  
19 --

20 THE COURT: Except as they argue, to get there they  
21 can argue that the initial transfers were not [indiscernible].

22 MS. WASICK: Yes. Which they haven't done, so they  
23 just had that one sentence -- yes.

24 Just briefly --

25 THE COURT: And I decline the invitation to figure

1 out why it's insufficient.

2 MS. WASICK: Right. And I'll just point out to you  
3 that the initial transfers in that argument are just Tremont,  
4 they're not Ascot's, we know that they made reference to --

5 THE COURT: Where did the Ascot transfers come from?

6 MS. WASICK: The Ascot transfers are all within the  
7 two year timeframe and not on the six year timeframe.

8 THE COURT: All right. Okay.

9 MS. WASICK: And as Your Honor points out, we do have  
10 that Proffer complaint in addition to the Tremont complaint.

11 And as for relation back, Your Honor, and this idea  
12 of them not being on notice and being surprised by the  
13 additional --

14 THE COURT: You know, at least a few cases that have  
15 talked about it in terms of initial transfers and said that  
16 each transfer is a separate cause of action.

17 MS. WASICK: Right, Your Honor, and those cases are  
18 preferential transfers. The cases -- and they're also such as  
19 Metzeler and in re [indiscernible] is what they're relying on,  
20 they're preferential transfer claims, number one. And number  
21 two, the Court found the initial complaint hadn't put them on  
22 notice. Whereas here, these defendants have been in litigation  
23 for five years with the Trustee and they're on notice from the  
24 initial complaint.

25 THE COURT: But you have at least one fund that

1 wasn't previously mentioned.

2 MS. WASICK: It's a fund managed by Tremont. So it's  
3 the same individuals.

4 THE COURT: Well, but it wasn't there and they're  
5 saying, you know, even if we knew about the other ones, how did  
6 your complaint put us on notice of this one?

7 MS. WASICK: Respectfully, Your Honor, they should be  
8 on, they should be more aware of the transfers than we are  
9 because they have access to their own records, whereas --

10 THE COURT: Well, but that's not the test. The test  
11 is that pleading has to put them on notice, right?

12 MS. WASICK: Right. And the pleading did that, Your  
13 Honor. This is all about their business with feeder funds and  
14 the transfers received as part of the course of that  
15 interaction.

16 Your Honor, unless you have more questions.

17 THE COURT: I think I've asked you enough.

18 MS. WASICK: Thank you, Your Honor.

19 MR. PEACE: Your Honor, can I respond to a couple of  
20 points and have my colleague respond?

21 THE COURT: Sure.

22 MR. PEACE: I think the back and forth further  
23 illustrates that the Trustee is really relying on an equity  
24 notice standard. I mean they speculate and make general  
25 statements about certain allegations, but they're not



1 particularized and they don't demonstrate that the BNP  
2 defendants, each of the BNP defendants, suspected that there  
3 was a high probability of fraud or particularly that they  
4 weren't trading of securities.

5 This is an example, Your Honor, they talk about the  
6 closing of the Oreades account basically saying you wouldn't  
7 close the account because it was making money. That's not a  
8 particular allegation that the account was closed because they  
9 suspected fraud at Madoff. You, Your Honor, pointed out  
10 earlier that there were all kinds of discussion of regulatory  
11 issues and whether or not they were in compliance. So to make  
12 the leap that they closed it because of suspicions of fraud is  
13 just not right.

14 The other thing they -- I'll just mention a couple of  
15 things that I didn't mention in my original argument, Your  
16 Honor. They mention that employees at PNB Paribas defendants  
17 got bonuses and that was the reason that they would engage in  
18 this economically irrational set of transactions. But in fact,  
19 there are no well-pleaded allegations that anyone received a  
20 bonus. They say typically people in the financial services  
21 industry get bonuses, but there's nothing in this complaint  
22 that supports that sort of bald assertion.

23 One other thing, Your Honor, I wanted to just point  
24 out because Your Honor talked a bit about with Trustee's  
25 counsel about the economic issue and what's happening with each

1 transaction.

2 I just want to point you to the amended, purported  
3 amended complaint, paragraph 183. And this talks about the  
4 credit facility with Santa Barbara. And remember, counsel  
5 talked a bit about the transaction with ZCM and BNP Paribas  
6 wanted to expand its business and become a big leveraged  
7 provider. One of the transaction that they got in connection  
8 with ZCM acquisition was a credit facility with Santa Barbara  
9 and then did another one.

10 If you read paragraph 183, Your Honor, it explains  
11 exactly what's happening here. The credit facility agreement  
12 called for BNP Paribas to make senior secured loans to Santa  
13 Barbara for leveraged investments with Harley. And Your Honor  
14 will remember Harley was one of the funds that has been  
15 dismissed on comity grounds and that reduced exposure for BNP  
16 Paribas by a billion dollars. So when they say we received  
17 transfers over a billion dollars, most of that is Harley, and  
18 that's based on a loan that was provided to Santa Barbara,  
19 where as it says here, Your Honor, it explicitly referenced  
20 Harley's Madoff account with BLMIS which served as collateral  
21 for the credit facility. So the payments that BNP Paribas  
22 actually got are exactly what they allege here -- interest  
23 payments and fees. These transfers that are coming in are  
24 repayments of loans that they're making.

25 THE COURT: There are also allegations that they're

1 getting a lot of redemptions.

2 MR. PEACE: Right. But that --

3 THE COURT: That's where they're getting the real  
4 money from, not --

5 MR. PEACE: Exactly. But, Your Honor, this is  
6 exactly, these are redemptions to pay off the loan. So that's  
7 why I stress that the type of transactions that we're talking  
8 about, that they're providing leverage, they are investing  
9 capital. And you'll see multiple examples of this throughout  
10 the complaint, Your Honor, where they're investing capital to  
11 give to their client so they can have exposure to Madoff. What  
12 they get back is retainment of what they gave the clients as a  
13 loan and some interest and fees. That's not big money making  
14 business. The downside risk in dealing with a potential Ponzi  
15 scheme is far greater than any fees in interest that they would  
16 get.

17 Your Honor, I just wanted to point that out to Your  
18 Honor as well.

19 MR. MACKINNON: Your Honor, just very briefly. You  
20 asked a question as to whether you can reach the personal  
21 jurisdictional issue first. I think in the --

22 THE COURT: Well, whether I have to.

23 MR. MACKINNON: Whether you have to. Excuse me, I  
24 reversed it. The [indiscernible] case that just came down,  
25 there's a concurrence from Judge Calabrese where he indicates

1 that you can address the merits before personal jurisdiction.  
2 I think we've got a cite to a Chevron case from the Second  
3 Circuit in 2012 as well where the Second Circuit said the same  
4 in a footnote that you can address the merits first.

5 Just very briefly on the jurisdiction point. Those  
6 exhibits that you went through with Trustee's counsel. They're  
7 not part of the complaint. They were filed as exhibits to the  
8 motion to dismiss.

9 THE COURT: Am I necessarily limited to the complaint  
10 on a motion to dismiss the personal jurisdiction if I receive  
11 affidavits?

12 MR. MACKINNON: If you're not going to have a full  
13 factual record, I think you're limited to the motion to  
14 dismiss. They've also had nine years to put this complaint  
15 together. So to have them submitting additional affidavits  
16 after the fact once they've seen our motion to dismiss, it  
17 seems like this is a case where they've had enough time to put  
18 forward a personal jurisdiction case if they're going to be  
19 able to put one forward.

20 THE COURT: You know, you often get affidavits  
21 relating to personal jurisdiction after the motion to dismiss,  
22 not before, because of the motion to dismiss.

23 MR. MACKINNON: Understood. The other point just on  
24 BNP defendants, the only BNP defendants alleged to have had a  
25 BNP, an account here in New York is BNP Paribas. There's no

1 allegation as to any other BNP defendants. I just wanted to  
2 reiterate that point.

3 THE COURT: I thought I saw in one of the exhibits,  
4 again, this is a personal jurisdiction issue, that Cayman had  
5 the account and it was payable to BNP Paribas, I assumes in New  
6 York, I don't know.

7 MR. MACKINNON: That may be the Ascot exhibit you  
8 were going through where the investors defined as BNP Cayman  
9 and Trust, and then a big redacted block. So it's not even  
10 clear from the exhibit that BNP Cayman is the investor because  
11 they redacted out the name of the investor. I suppose it's  
12 probably on behalf of somebody, but we don't know who it was on  
13 behalf of. But if you look at the complaint which again should  
14 be the focus of the inquiry, there's one entity alleged to have  
15 had a New York account, that's BNP Paribas.

16 I think that's all I wanted to add, Your Honor.

17 THE COURT: All right. Thank you very much. I'll  
18 reserve decision.

19 MR. MACKINNON: Thank you, Your Honor.

20 (Proceedings concluded at 11:29 a.m.)

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I N D E X

RULINGS

DESCRIPTION

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HEARING RE BNP Paribas S.A.'s Motion to Dismiss

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CERTIFICATION

I, Theresa Pullan, certify that the foregoing is a  
correct transcript from the official electronic sound recording  
of the proceedings in the above-entitled matter.

AAERT Certified Electronic Transcriber CET\*\*00650

Theresa Pullan

Veritext  
330 Old Country Road  
Suite 300  
Mineola, NY 11501

[& - allegation]

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